IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES FRIPP,	:	
	:	CIVIL ACTION
PETITIONER,	:	
	:	
v.	:	
	:	No. 03-4942
SUPERINTENDENT MEYERS, ET AL.,	:	
	:	
RESPONDENTS.	:	

M E M O R A N D U M

Padova, J. **December 13, 2004**

Before the Court is Charles Fripp's *pro se* Petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254. On July 28, 2004, United States Magistrate Judge Carol Sandra Moore Wells filed a Report and Recommendation that recommended denying the Petition in its entirety. Petitioner filed timely objections to the Report and Recommendation. For the reasons that follow, the Court overrules Petitioner's objections, adopts the Report and Recommendation, and denies the Petition in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 17, 1990, following a jury trial, Petitioner was convicted of rape, corruption of a minor and simple assault. Commonwealth of Pennsylvania v. Fripp, No. 5226 Phila. 1997, slip op. at 1 (Pa. Super. Ct. Feb. 10, 1999). On January 3, 1991, he was sentenced to concurrent terms of seven and one-half to fifteen years of imprisonment for the rape conviction; two and one-half to five years of imprisonment for the corruption of a minor

conviction; and one to two years of imprisonment for the assault conviction. Id. After receiving credit for time served, Petitioner's minimum release date was July 16, 1997. (Resp. Ex. R-1.) His maximum release date is January 16, 2005. (Id.)

Petitioner's first application for parole was denied by the Pennsylvania Board of Probation and Parole (the "Board") on May 13, 1997 for the following reasons: "assaultive instant offense; very high assaultive behavior potential; weapon involved in the commission of offense; your need for counseling and treatment; failure to participate in and benefit from a treatment program for sex offenders; unfavorable recommendation from the Department of Corrections." (Resp. Ex. R-2.) The Board set Petitioner for another review in or after May 1999 and instructed him to "participate in prescriptive program plan, including sex therapy . . . maintain a clear conduct record . . . [and] "earn an institutional recommendation for parole." (Id.)

Petitioner's second application for parole was denied on May 21, 1999 because "following an interview and review of your file, the [Board] has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." (Resp. Ex. R-3.) The Board set Petitioner for another review in or after May 2001 and informed him that it would consider whether he had successfully completed a treatment program for sex offenders,

received a favorable recommendation for parole from the Department of Corrections, maintained a clear conduct record, and completed prescriptive programs. (Id.) Petitioner's third application for parole was denied on May 14, 2001 because "following an interview and review of your file, the [Board] has determined that the fair administration of justice cannot be achieved through your release on parole." (Resp. Ex. R-4.) He was set for another review in or after May 2002 and informed that the Board would consider whether he had successfully completed a treatment program for sex offenders, received a favorable recommendation for parole from the Department of Corrections, maintained a clear conduct record, and completed prescriptive programs. (Id.) Petitioner's fourth application for parole was denied on May 17, 2002 because "following an interview and review of your file, the [Board] has determined that the fair administration of justice cannot be achieved through your release on parole." (Resp. Ex. R-5.) The Board ordered him to serve his unexpired maximum sentence of January 16, 2005, or be reviewed if recommended by the Department of Corrections. (Id.) He was again informed that the Board would consider whether he had successfully completed a treatment program for sex offenders, received a favorable recommendation for parole from the Department of Corrections, had a clear conduct record and completed prescriptive programs. (Id.)

Petitioner sought review of the fourth denial of parole

through a *mandamus* action filed in the Commonwealth Court. (Resp. Ex. R-8.) He stated the following grounds for relief: (1) the Board failed to provide him with "a brief statement of its reasons for denying his second, third and fourth parole applications, and without such statement petitioner is precluded from assessing whether the Board employed the proper factors in its decision-making process;" (2) the Board "erred as a matter of law or arbitrarily abused its discretion" by denying Petitioner's second, third and fourth parole applications "without providing him a brief statement of its reason for the denial;" (3) the Board's denial of his second, third and fourth parole applications was "influenced by the 1996 amendments to the Probation and Parole Laws, 61 P.S. § 331.1 et seq. . . ., and corresponding changes in the parole decision-making policies of the Board," which altered the review of parole applications by making public safety "the first and foremost concern in the Board's decision making-process [sic];"[1] and (5) the

[1]In December 1996, the Pennsylvania legislature amended the parole law by adding language regarding the importance of the protection of public safety to the public policy provision of the parole statutes:

> § 331.1. Public policy as to parole
> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
> In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the

Board's application of the 1996 amendments to the Parole Laws in its denial of Petitioner's second, third and fourth parole applications violated the Ex Post Facto clause of the Constitution. (Resp. Ex. R-8, ¶¶ 10-18.)

The Board responded by modifying its May 17, 2002 decision denying Petitioner's application for parole by stating that, after an interview with Petitioner and review of his file, and having considered all matters required by the Parole Act of 1941, as amended, it had determined that his best interests did not justify or require his being paroled and that the interests of the Commonwealth would be injured if he were paroled. (Resp. Ex. R-6.) The Board based its decision on the following:

> Your refusal to accept responsibility for the offense(s) committed. The recommendation made by the Department of Corrections. Your unacceptable compliance with prescribed institutional programs. Your need to participate in and complete additional institutional programs. Other factors deemed pertinent in determining that you should not be paroled: habitual offender (aggravated assault, firearms offense, disorderly conduct); assaultive instant offense (forcibly raped 8-year-old girl); victim injury.

(Id.) On July 16, 2003, the Commonwealth Court denied Petitioner's application on the merits, because the Pennsylvania courts had

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> public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

61 Pa. Stat. Ann. § 331.1.

rejected similar ex post facto claims in Winklespecht v. Pennsylvania Bd. of Prob. and Parole, 813 A.2d 866 (Pa. 2002) and Reynolds v. Pennsylvania Bd. of Prob. and Parole, 809 A.2d 426 (Pa. Commw. Ct. 2002), and found his claim that the Board had failed to provide reasons for its denial of his parole applications to be moot. Fripp v. Pennsylvania Bd. of Prob. and Parole, No. 330 M.D. 2003, Order (Pa. Commw. Ct. July 16, 2003). Petitioner did not appeal this decision to the Pennsylvania Supreme Court.

Petitioner filed the instant Petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. § 2254 on September 2, 2003 and filed an Amended Petition on September 19, 2003. The Amended Petition alleges that the Board's denial of his second, third and fourth applications for parole violated the Ex Post Facto clause of the United States Constitution by applying the December 1996 amendment to Section 331.1, even though his conviction predates that amendment. The Magistrate Judge filed a Report and Recommendation recommending that the Court deny the Amended Petition as procedurally defaulted and on the merits, because Petitioner was not disadvantaged by the Board's reliance on the amendment to Section 331.1 in connection with his parole applications. Petitioner objects to the Report and Recommendation on the grounds that his procedural default should be excused and the Magistrate Judge misunderstood his claim that he is entitled to parole. (Obj. at 2-3.)

II. STANDARD OF REVIEW

Where a *habeas* petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b).

The instant Petition was filed pursuant to 28 U.S.C. § 2254 which allows federal courts to grant *habeas corpus* relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Since it was filed after April 24, 1996, the Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214; see Lindh v. Murphy, 521 U.S. 320, 326-27 (1997). Section 2254(d)(1), as amended by the AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1). Under the AEDPA, a state court's legal determinations may only be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." See 28 U.S.C.A. § 2254(d)(1). This phrase refers to the "holdings, as opposed to the dicta" of the United States Supreme Court's decisions as of the time of the relevant state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000).

To apply the AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts initially must determine whether the state court decision regarding each claim was contrary to clearly established Supreme Court precedent. Werts v. Vaughn, 228 F.3d 178, 197 (3d Cir. 2000). A state court decision may be contrary to clearly established federal law as determined by the United States Supreme Court in two ways. See Williams, 529 U.S. at 405. First, a state court decision is contrary to Supreme Court precedent where the court applies a rule that contradicts the governing law set forth in United States Supreme Court cases. Id. Alternatively, a state court decision is contrary to Supreme Court precedent where the state court confronts a case with facts that are materially indistinguishable from a relevant United States Supreme Court precedent and arrives at an opposite result. Id. at 406. If relevant United States Supreme Court precedent requires an

outcome contrary to that reached by the state court, then the court may grant habeas relief at this juncture. Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877, 890 (3d Cir. 1999).

If the state court decision is not contrary to precedent, the court must evaluate whether the state court decision was based on an unreasonable application of Supreme Court precedent. Id. A state court decision can involve an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case. Williams, 529 U.S. at 407. To grant a *habeas corpus* writ under the unreasonable application prong, the federal court must determine that the state court's application of clearly established federal law was objectively unreasonable. Id. at 409; Werts, 228 F.3d at 197. A federal court cannot grant *habeas corpus* simply by concluding in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; mere disagreement with a state court's conclusions is insufficient to justify relief. Williams, 529 U.S. at 411; Matteo, 171 F.3d at 891. In determining whether the state court's application of the Supreme Court precedent is objectively unreasonable, habeas courts may consider the decisions of inferior federal courts. Matteo, 171 F.3d at 890.

Section 2254 further mandates heightened deference to state court factual determinations by imposing a presumption of

correctness. 28 U.S.C.A. § 2254(e)(1). The presumption of correctness is rebuttable only through clear and convincing evidence. Id. Clear and convincing evidence is evidence that is "so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985).

A. Procedural Default

The Magistrate Judge recommended that Petitioner's claim that the Board's denial of his second, third and fourth parole applications violates the Ex Post Facto clause of the Constitution has been procedurally defaulted because that claim was not presented to the Supreme Court of Pennsylvania. A person in custody pursuant to the judgment of a state court may not file a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 unless he or she has "exhausted the remedies available in the courts of the State . . . ." 28 U.S.C. § 2254(b)(1)(A). In order to exhaust the available state court remedies on a claim, a petitioner must fairly present all the claims that he will make in his *habeas corpus* petition in front of the highest available state court, including courts sitting in discretionary appeal. O'Sullivan v. Boerckel, 526 U.S. 838, 847-48 (1999). To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that

puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). Thus, "[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court." Evans v. Court of Common Pleas, Delaware County, Pennsylvania, 959 F.2d 1227, 1231 (3d Cir. 1992). The burden of establishing that a habeas claim was fairly presented in state court falls upon the petitioner. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000). "[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas. . . ." Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). Procedural default bars federal review of those claims precluded by state law. Id. at 729.

Since Petitioner's *mandamus* action originated in the Commonwealth Court, Petitioner had a right of direct appeal of the Commonwealth Court's denial of his petition to the Supreme Court of Pennsylvania. Pa. R. App. P. 1101(a)(1). Petitioner does not deny that he failed to present his Ex Post Facto claims to the Supreme Court of Pennsylvania, accordingly, his claims are unexhausted. As his time for filing an appeal of the Commonwealth Court's decision

denying his petition for *mandamus* expired on August 15, 2003 (thirty days after the Commonwealth Court order was issued), his Ex Post Facto claims have been procedurally defaulted. See Pa. R. App. P. 903(a), 1101(b). Petitioner objects to the Magistrate Judge's recommendation that his Ex Post Facto claims have been procedurally defaulted on the grounds that Magistrate Judge erred in failing to recommend that this procedural default be excused.

Procedural default may be excused, and a petitioner's *habeas* claims considered by a federal court, where the petitioner "can demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. In order to demonstrate cause for the default, Petitioner must show that some objective factor, outside of his control, prevented his compliance with state procedural rules. Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992). Petitioner does not assert the existence of any external factors, outside of his control, that prevented him from timely appealing the Commonwealth Court's decision to the Pennsylvania Supreme Court. Consequently, the Court finds that Petitioner has not demonstrated cause for the default.[2] In order to establish that the Court's failure to consider his Ex Post Facto claims would

[2]As Petitioner has failed to establish the existence of cause for his procedural default, the Court need not consider whether Petitioner has established prejudice.

result in a fundamental miscarriage of justice, Petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). Petitioner has not challenged his conviction or asserted that he is actually innocent of the crime for which he was imprisoned. Accordingly, Petitioner has failed to demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural default. Petitioner's objection to the Magistrate Judge's recommendation that his claims have been procedurally defaulted is, therefore, overruled.

B. Merits

In the interest of judicial efficiency, the Magistrate Judge also considered the merits of Plaintiff's Ex Post Facto claims, as "an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). The Magistrate Judge recommended that Petitioner's Ex Post Facto claims should be denied on the merits because he was not prejudiced by the application of the 1996 amendments to the Board's consideration of his parole applications. Petitioner objects to this recommendation on the grounds that the Magistrate Judge failed to understand the nature of his request for parole and his factual eligibility for parole.

The Ex Post Facto clause of the Constitution prohibits states

from passing "any ... ex post facto Law." U.S. Const. art. I, § 10, cl. 1. The Ex Post Facto clause "applies to a statutory or policy change that 'alters the definition of criminal conduct or increases the penalty by which a crime is punishable.'" Mickens-Thomas v. Vaughn, 321 F.3d 374, 383-84 (3d Cir. 2003) (quoting California Dep't of Corr. v. Morales, 514 U.S. 499, 506 n.3 (1995)). "A new law or policy violates the Ex Post Facto clause (1) when it is retrospective, i.e., when it 'appl[ies] to events occurring before its enactment,' and (2) when it 'disadvantage[s] the offender affected by it.'" Mickens-Thomas, 321 F.3d at 384 (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). The Supreme Court has determined that a two step inquiry should be used in deciding whether a retroactive change in parole rules violates the Ex Post Facto clause: the court examines first whether the legislative change "'increases the penalty by which a crime is punishable'" and, if it does not, the court examines whether the challenger has demonstrated "by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule. Garner v. Jones, 529 U.S. 244, 255 (2002) (quoting Morales, 514 U.S. at 506-07 n.3).

Petitioner bases his Ex Post Facto claims on the decision of the United States Court of Appeals for the Third Circuit ("Third

Circuit") in Mickens-Thomas v. Vaughn, 321 F.3d 374 (3d Cir. 2003). In Mickens-Thomas, the Third Circuit considered whether the Board's reliance on the December 1996 amendment to section 331.1, in its consideration of the parole application of a prisoner who had been convicted prior to 1996, violated the Ex Post Facto clause. Id. at 376. Mickens-Thomas argued that "the Board denied his parole in violation of the Ex Post Facto clause, by applying retroactively the revised December 1996 parole statute," rather than the parole statute in effect at the time of his conviction. Id. at 383. The Third Circuit determined that, "after 1996, the Board gave foremost importance to the public safety factor." Id. at 384. The Third Circuit found that the evidence demonstrated that:

> since 1996, the Board has given special weight to the risk to public safety. Pre-1996, a prisoner could be denied parole because of public safety concerns only if those concerns together with other relevant factors outweighed, by a preponderance, the liberty interests of the inmate. The 1996 policy change placed first and foremost the public safety to the disadvantage of the remaining liberty interest of the prisoner.

Id. at 385. The Third Circuit concluded that "to retroactively apply changes in the parole laws made after conviction . . . in Pennsylvania that adversely affect the release of prisoners . . . violates the Ex Post Facto Clause." Id. at 393.

The Commonwealth Court rejected Petitioner's Ex Post Facto argument based upon the decision of the Pennsylvania Supreme Court in Winklespecht v. Pennsylvania Bd. of Prob. and Parole, 813 A.2d

688 (Pa. 2002) and the decision of the Commonwealth Court in Reynolds v. Pennsylvania Bd. of Prob. and Parole, 809 A.2d 426 (Pa. Commw. Ct. 2002). The Winklespecht court determined that the amendment to section 331.1 did not raise an Ex Post Facto issue because the "rewording of 61 P.S. § 331.1 did not create a substantial risk that parole would be denied any more frequently than under the previous wording, nor did the addition of this language create a new offense or increase the penalty for an existing offense." Id. at 692. The Reynolds court reasoned that the amendment did not facially violate the Ex Post Facto clause because the modification to "Section 1 does not modify the statutory punishment for any particular offense, does not . . . alter the standards for determining the initial date of parole eligibility and does not alter existing standards for an inmate's suitability for parole." 809 A.2d at 433.

To the extent that these decisions have altered the Board's view of the December 1996 amendment, they were both issued after the Board denied Petitioner's second, third and fourth parole applications and "came too late to alter the Board's view of the statutory amendment on the outcome" of Petitioner's applications for parole. Mickens-Thomas, 321 F.3d at 391. This Court must, therefore, follow Mickens-Thomas, which is binding on this Court, and which "clearly holds as a legal matter" that the application of the amendment to section 331.1 to a prisoner who was convicted

prior to 1996 may violate the Ex Post Facto clause. Hollawell v. Gillis, 65 Fed. Appx. 809, 816 (3d Cir. 2003) (not precedential) cert. denied, 540 U.S. 875 (2003). Consequently, the Court must consider the second Ex Post Facto criterion, i.e., whether Petitioner, like Mickens-Thomas, was disadvantaged by the application of the amendment to section 331.1 to his second, third and fourth applications for parole. See Mickens-Thomas, 321 F.3d at 384, 391.

The Board cited "mandates to protect the safety of the public and to assist in the fair administration of justice" as reasons for the decision to deny Petitioner's second parole application. (Resp. Ex. R-3.) However, the Board did not mention public safety as a factor in its decisions to deny Petitioner's third and fourth applications for parole. The Board also instructed Petitioner, in its denials of his second, third and fourth applications for parole, that it would consider whether he had successfully completed a treatment program for sex offenders, received a favorable recommendation for parole from the Department of Corrections, maintained a clear conduct record, and completed prescriptive programs when it considered further applications for parole. (Resp. Exs. R-3, R-4 and R-5.) These considerations are consistent with the parole considerations used by the Board prior to the December 1996 amendment. Those considerations were set forth in the Board's 1989 Manual of Operations and Procedures and

the Parole Decision Making Guidelines (the "Guidelines"). The 1989 Manual stated that, "in considering an inmate for parole, the Board must 'weigh[] numerous factors relative to the welfare of the community,' including seriousness of the offense; length of the sentence; institutional adjustment (behavior and program adjustment); and assessment of the effect of rehabilitation services while incarcerated." Mickens-Thomas, 321 F.3d at 378. The Guidelines used factors which were predictors of future recidivism such as the type of offense, risk to the community, and assaultive behavior potential. Id. at 378-79.

Unlike Mickens-Thomas, who received the recommendation of the Department of Corrections and participated in pre-release counseling, sex offender therapy, college courses and job training, id. at 381, there is no evidence on the record of this Petition that Petitioner complied with the instructions of the Board by completing a treatment program for sex offenders, receiving favorable recommendations for parole from the Department of Corrections, maintaining a clear conduct record, and completing prescriptive programs. Indeed, the Board made it clear that Petitioner's second, third and fourth parole applications were denied because Petitioner refused to accept responsibility for his offense, did not receive a favorable recommendation from the Department of Corrections, and did not comply with prescribed institutional programs. (Resp. Ex. R-6.) The Board also

considered Petitioner's "failure to participate in and complete additional institutional programs," his habitual offender status, the "assaultive instant offense," and victim injury. (Id.) Petitioner has not, therefore, established that he would have been entitled to parole if the Board had utilized only the pre-amendment parole considerations.

The Court concludes, based on the evidence of record, that Petitioner has not met his burden of demonstrating that the retroactive application of the December 1996 amendment to 61 Pa. Stat. Ann. § 331.1 resulted in a longer period of incarceration than he would have experienced but for the 1996 amendment. See Garner, 529 U.S. at 255. Consequently, he has not established that he was disadvantaged by the retroactive application of the 1996 amendment. See Mickens-Thomas, 321 F.3d at 384. Petitioner's objection to the Magistrate Judge's recommendation that his Petition should be denied on the merits is, therefore, overruled.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES FRIPP, PETITIONER,	:	CIVIL ACTION
v.	:	No. 03-4942
SUPERINTENDENT MEYERS, ET AL. RESPONDENTS.	:	

O R D E R

AND NOW, this 13th day of December, 2004, upon careful and independent consideration of the Petition for Writ of *Habeas Corpus* (Doc. No. 1) and all memoranda filed with respect thereto, after review of the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells, and in consideration of Petitioner's Objections to the Magistrate's Report and Recommendation, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED** to the extent that it is consistent with this Order-Memorandum;
3. The petition for writ of *habeas corpus* is **DENIED**;
4. As Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability pursuant to 28 U.S.C. §

2253(c)(2); and

5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:

_____
John R. Padova, J.